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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-361

No. COA21-475

Filed 17 May 2022

I.C. Nos. 19-016250 & 19-729851

LISA MILLER, Employee, Plaintiff,

v.

AURIA SOLUTIONS LIMITED, Employer, ZURICH AMERICAN INSURANCE COMPANY, Carrier, Defendants.

Appeal by Defendants and cross-appeal by Plaintiff from opinion and award entered 18 May 2021 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 25 January 2022.

Sellers, Ayers, Dortch & Lyons, PA, by Christian R. Ayers and John F. Ayers, III, for Plaintiff-Appellee/Cross-Appellant.

Rudisill, White & Kaplan, P.L.L.C., by Garth H. White, for Defendants-Appellants/Cross-Appellees.

INMAN, Judge.

¶ 1 Defendants Auria Solutions Limited ("Auria") and Zurich American Insurance Company (collectively, "Defendants") appeal from an opinion and award of the Industrial Commission awarding Plaintiff Lisa Miller ("Plaintiff") temporary total disability compensation at a rate of $441.16 per week from 5 April 2019 until 23 October 2019. Plaintiff cross-appeals the same award's denial of permanent partial

disability benefits. Defendants contend on appeal that the Commission erred in concluding Plaintiff's injuries were compensable as occupational diseases, while Plaintiff argues the Commission erred in concluding she is not entitled to continued benefits based on partial disability. After careful review, we affirm the Commission's opinion and award and dismiss Plaintiff's cross-appeal as untimely filed.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶ 2 The record below discloses the following:

¶ 3 Plaintiff was hired by Auria on 25 April 2014 to work as a mold line operator shaping felt carpet into liners for installation in automobiles. Plaintiff's job duties involved cutting and molding the felt carpet liners, which required repetitive motions with her right arm and shoulder. Plaintiff did not engage in any activity outside of employment that required her to perform those same repetitive motions.

1. The Injury and Diagnosis

¶ 4 On 25 March 2019, Plaintiff was performing her job duties as a mold line operator on Line 8. About an hour into her shift, Plaintiff moved to place a part on the water jet machine and felt a "very sharp, burning pain" when she reached forward to apply pressure and seat the material on the machine. Plaintiff described the pain as like a "tiger claw" ripping her arm. Plaintiff saw Doctor Christopher Elder, M.D., a board-certified orthopedic surgeon who performs almost exclusively shoulder, hip, and knee arthroscopic procedures.

¶ 5 Dr. Elder reviewed Plaintiff's MRI which showed a partial thickness interstitial tear of the supraspinatus and infraspinatus tendons. Dr. Elder assessed Plaintiff with right shoulder pain, impingement syndrome, and a rotator cuff tear. He initially discouraged surgery and recommended physical therapy and a round of steroids and meloxicam. Ten days later, on 5 April 2019, Dr. Elder restricted Plaintiff from work. Plaintiff returned to Dr. Elder a few weeks later and reported worsening shoulder pain, diminished range of motion, numbness and tingling in her fingers, and difficulty resting due to pain.

¶ 6 On 23 May 2019, Dr. Elder performed arthroscopic surgery to repair Plaintiff's right shoulder. Beyond the initial diagnoses revealed by the MRI, the arthroscopy revealed a "[s]houlder impingement with type II SLAP tear,[1] mild biceps tendinopathy, and high-grade partial-thickness rotator cuff tear." Dr. Elder also found subacromial bursitis and spurring off of the acromioclavicular joint.

¶ 7 Plaintiff continued to receive post-operative care from Dr. Elder. After a brief release for light duty work, Plaintiff was again restricted from work on 7 August 2019. Auria had not assigned light work to Plaintiff during her period of light work restrictions and terminated Plaintiff on 21 September 2019. Dr. Elder again cleared

[1] A SLAP tear is a particular tear of the labrum and is sometimes referred to in the record as the "labrum tear."

Plaintiff for light duty work on 23 October 2019, but Plaintiff did not pursue employment within those restrictions.

2. Plaintiff's Workers' Compensation Claim and Dr. Elder's Expert Testimony

¶ 8 Defendants denied any compensable injury occurred under the North Carolina Workers' Compensation Act and, on 2 July 2019, Plaintiff filed a request for hearing with the Industrial Commission.

¶ 9 On 31 July 2019, Dr. Elder completed an opinion letter at Plaintiff's request and answered "yes" to the following questions:

> 1. In your opinion, did the job duties, as described by the patient, more likely than not cause or significantly contribute to the development of Ms. Miller's Impingement Syndrome of the right shoulder?
>
> 2. In your opinion, did the job duties, as described by the patient, more likely than not cause or significantly contribute to the development of Ms. Miller's Type II SLAP Tear, Biceps Tendinopathy, high grade partial-thickness, and Rotator Cuff Tear, for which you performed surgery?
>
> 3. In light of Ms. Miller's greater than five-year career as a production worker, and the peculiar requirements of that job, did Ms. Miller's job duties place her at an increased risk (greater than the general population not so employed as a production worker) of developing the right shoulder conditions you diagnosed Plaintiff with and which required surgery?
>
> 4. Did Ms. Miller's occupational exposure to the job duties of her production job cause or significantly contribute to her need for surgery for SLAP Repair, Biceps Tenodesis,

> Subacromial Decompression, Distal Clavicle Excision, and Rotator Cuff Repair?

¶ 10 Dr. Elder also testified by deposition prior to the Industrial Commission hearing. He confirmed that Plaintiff's job duties "more likely than not significantly contributed" to Plaintiff's impingement syndrome, SLAP tear, biceps tendinopathy, high-grade partial-thickness and rotator cuff tear. He also confirmed that her job duties "placed her at an increased risk [for developing those conditions] that was greater than the general population not so employed." He further testified that "[h]er occupational exposure to the job I think significantly contributed to the need for surgery" and was "satisfied that her job made it more likely than not that she had shoulder problems." He similarly testified that her degenerative injuries "were a chronic process that happened over weeks, months, years . . . that her job contributed to." As for her SLAP tear specifically, he testified that there "was probably, more likely than not some fraying or wearing of the labrum prior" to the SLAP tear that significantly contributed to the injury.

¶ 11 Though Dr. Elder was unequivocal in his initial testimony, he did not testify that Plaintiff's job was the sole or necessary cause of her injuries. For example, he testified that he did not know whether it was likely that Plaintiff's injuries would not have occurred absent her job duties, explaining that "I'll have people that do it with low mechanism injury, had no previous problems, I'll have people that the wear and

tear is a factor, but I just don't know. And I hate doing this to both of you [Plaintiff's and Defendants' counsel], but you're both right, you really are." When asked whether the "constellation" of Plaintiff's increased risk, degenerative conditions, and job duties resulted in her acute injury, he testified:

> I don't—I honestly don't know. To me that might be more of a legal question than medical question. I guess that's why you guys have your jobs. I just don't know. Because somebody could out of the blue for no good reason reach the wrong way and tear their shoulder. I've had 23-year-olds do that.
>
> . . . .
>
> [W]hat I'm getting—what percentage is that job—what factor is that job? Is it a little bit medium or a lot of it[?]

He ultimately refused to state a "specific percent" that Plaintiff's job contributed to her injuries, as to do so would be "speculation."

¶ 12 Dr. Elder also acknowledged on cross-examination that SLAP and rotator cuff tears may be caused by either acute injury or degenerative conditions. He further agreed with Defendants' counsel that Plaintiff's degenerative changes were "consistent with what you would expect to see in a 58-year-old . . . regardless of occupation."

¶ 13 As for Plaintiff's injury, Dr. Elder was asked which of the diagnoses he would consider to be a degenerative process. He replied that the "rotator cuff was more generalized wear and tear;" the changes of the acromioclavicular joint and the

bursitis were wear and tear and degenerative; the tendinopathy of the biceps tendon was degenerative wear and tear; the SLAP tear was "harder" but it could have been "partially torn or frayed, you know, the day before." When asked about the outcome of the particular acute event, Dr. Elder responded, "I think more likely than not that's when she tore her labrum, the SLAP tear. And again she might have had some degenerative wearing or fraying prior to that, but I think that was the straw that broke the camel's back so to speak." Dr. Elder held that opinion to a reasonable degree of medical certainty.

¶ 14 Dr. Elder further clarified the relationship between any degenerative conditions and Plaintiff's SLAP tear. When asked whether the "weakness that was in the labrum from the repetitive movement would have significantly contributed to [the SLAP tear]," Dr. Elder confirmed he thought it was a significant contribution to Plaintiff's tear. As to the existence of that degenerative condition, Dr. Elder testified:

> I will say, I'm going to go back a step, the fact that it wasn't a very high mechanism injury, she was just reaching the wrong way, means that there was probably, more likely than not some fraying or wearing of the labrum prior that caused—because it wasn't like she got hit by a bus, it was she reached the wrong way. So there's probably some fraying of that labrum prior to that.

¶ 15 The Industrial Commission entered its opinion and award on 18 May 2021, concluding that Plaintiff's shoulder injuries were compensable occupational diseases. In its order, the Commission recounted Dr. Elder's testimony, expressly found it to

be credible, and "accord[ed] it great weight." The Commission "further f[ound] that Plaintiff's employment with Defendant-Employer placed her at an increased risk of developing her right shoulder conditions as compared to members of the general public not so employed and was a significant contributing factor in the development of her right shoulder conditions." However, the Commission denied Plaintiff's request for permanent disability benefits beyond continued compensation for treatment of her shoulder injuries, concluding that she had failed to prove ongoing disability.

¶ 16 On 8 June 2021, Defendants filed an appeal from the Full Commission's decision to this Court, though they failed to serve Plaintiff as required by Rule 18 of the North Carolina Rules of Appellate Procedure. Plaintiff moved to dismiss Defendants' appeal on 22 July 2021 and, on 16 August 2021, the Commission denied Plaintiff's motion on the basis that any failure to serve Plaintiff with the notice of appeal was a non-jurisdictional defect. The next day, Plaintiff filed a notice of cross-appeal from the Commission's opinion and award. Defendants moved this Court to dismiss Plaintiff's cross-appeal as untimely on 27 August 2021.

II. ANALYSIS

¶ 17 Defendants challenge the Commission's conclusion that Plaintiff's shoulder injuries resulted from compensable occupational disease based on three arguments: (1) because Plaintiff's shoulder was asymptomatic before the SLAP tear that prompted surgery, her acute SLAP tear injury cannot be said to be an "occupational

disease;" (2) because Dr. Elder's testimony was so conflicting, it was not competent to support his opinion that she suffered from an occupational disease; and (3) because Plaintiff's injuries are not compensable as occupational disease and do not qualify as arising out of a workplace accident Plaintiff has no valid workers' compensation claim. We disagree and hold that the Commission properly awarded Plaintiff benefits on the basis of occupational disease.

¶ 18 As for the motion to dismiss her cross-appeal, Plaintiff contends that her time to file her cross-appeal was indefinitely tolled because she was never served with Defendants' notice of appeal. Because binding precedent establishes that Plaintiff's cross-appeal was untimely under Rule 18 of the North Carolina Rules of Appellate Procedure, we are compelled to disagree and grant Defendants' motion to dismiss for lack of jurisdiction.

1. Standard of Review

¶ 19 "In reviewing an order and award of the Industrial Commission in a case involving workmen's compensation, [an appellate court] is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings." *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980) (citation omitted). "As long as the Commission's findings are supported by competent evidence of record, they will not be overturned on appeal." *Rackley v. Coastal Painting,* 153 N.C. App. 469, 472, 570

S.E.2d 121, 124 (2002) (citation omitted). In other words, said findings may be set aside only when "there is a complete lack of competent evidence to support them." *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (citations and quotation marks omitted). Conclusions of law are reviewed *de novo*. *Whitfield v. Lab. Corp. of Am.*, 158 N.C. App. 341, 348, 581 S.E.2d 778, 783 (2003).

2. Plaintiff's Injury is an Occupational Disease

¶ 20 An occupational disease exists when:

> (1) [it is] characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) [it is] not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) [there exists] "a causal connection between the disease and the [claimant's] employment."

Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (citations omitted). Under the first two prongs, an employee need not show that the disease is unique to the job but need only show that "the employment exposed the worker to a greater risk of contracting the disease than the public generally." *Id.* at 93-94, 301 S.E.2d at 365 (citation omitted).

¶ 21 The third prong—causation—must be shown by expert testimony. *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003). The competent evidence need not rule out all possible causes of the disease but only demonstrate that the job "was a causal factor." *Id.* at 231-32, 581 S.E.2d at 752. "[M]edical certainty is not

required," *id.* at 234, 581 S.E.2d at 754, and testimony that the job "'more than likely' caused an injury or that the witness is satisfied to a 'reasonable degree of medical certainty' has been considered sufficient." *Carr v. Dept. of Health and Human Svcs. (Caswell Center)*, 218 N.C. App. 151, 155, 720 S.E.2d 869, 873 (2012) (citations omitted).

¶ 22 Defendants first argue that because Plaintiff's SLAP tear was a sudden, acute injury, it cannot be deemed an occupational disease. This argument is without merit. This Court has, in several other cases, held a rotator cuff tear was an occupational disease even when the tear itself was a discrete event occurring on a discrete date. *See, e.g., Garren v. P.H. Glatfelter, Co.*, 131 N.C. App. 93, 97, 504 S.E.2d 810, 813 (1998) (holding a rotator cuff tear was compensable occupational disease); *Gibbs v. Leggett and Platt, Inc.*, 112 N.C. App. 103, 109, 434 S.E.2d 653, 657 (1993) (holding a "spontaneous tear of the rotator cuff is an occupational disease"); *Flynn v. EPSG Mgmt. Svcs.*, 171 N.C. App. 353, 614 S.E.2d 460 (2005) (holding a rotator cuff tear marked by "a sudden, piercing pain" was a compensable occupational disease, as the tear was "the final straw that broke the camel's back" after performing a job that required constant overhead activity).

¶ 23 Defendants attempt to distinguish the above cases by pointing out that those workers all had some pain in their shoulders before suffering eventual tears, whereas Plaintiff was asymptomatic until her SLAP tear. But nothing in the caselaw or the

two-pronged test set forth in *Rutledge* requires that the disease be *symptomatic* for a long period before making itself known by acute pain; indeed, several of our prior rotator cuff cases held that injury to be a compensable disease without relying on prior symptoms in their analyses determining the injury to be an occupational disease. *See Flynn*, 171 N.C. App. at 357, 614 S.E.2d at 463 (holding sudden rotator cuff tear to be compensable occupational injury without referring to prior symptoms in its analysis); *Garren*, 131 N.C. App. at 96-97, 504 S.E.2d at 813 (holding sudden rotator cuff tear to be compensable occupational injury without relying on prior symptoms in its analysis of occupational disease or contribution of job to injury). In short, there is no published authority that would preclude Plaintiff from recovering for an occupational disease that developed silently and gradually before making itself obvious by sudden pain and acute harm.

¶ 24 Defendants rely on this Court's decision in *Valladares v. Tech Elec. Corp.*, 231 N.C. App. 715, 754 S.E.2d 258, 2014 WL 47124 (2014) (unpublished). However, that decision is not binding and is entirely distinguishable. In that case, the Commission denied the plaintiff's claim because he "stipulated that [his] injury was acute, rather than degenerative in nature. Plaintiff thus admits that his injury was the result of [a specific] incident and not the result of a work-place degenerative condition." *Id.* at *4. The Commission relied on this concession in denying the plaintiff's claim and concluded that there was "*no expert medical evidence* of record to support the

contention that Plaintiff's meniscus tear *was the result of* a chronic degenerative process or disease which was caused by his employment with [the employer]." *Id.* (emphasis added, emphasis in original removed).

¶ 25 *Valladares* is further distinguishable. There, the Deputy Commissioner originally found that the "Plaintiff failed to prove that his torn right meniscus is a diseased condition or degenerative process . . . rather than an acute injury occurring at a discrete time and place. . . . Nor did Plaintiff prove by competent evidence that he suffered from any *underlying disease that led to his injury*." *Id.* at *2 (emphasis added). Subsequent discussion in the opinion revolved around two points: (1) the Full Commission's finding that the plaintiff's job did not place him at an increased risk of suffering a meniscus-type injury, the first two prongs of the *Rutledge* test in finding an occupational disease, and (2) an analysis based on precedent, that the acute injury in question was not an occupational disease. *Id.* at *3-*5. The court found it "dispositive that . . . Plaintiff failed to meet his burden in proving that his condition—*an acute tear of the medial meniscus in his right knee*—constitutes an occupational disease." *Id.* at *5 (emphasis added, emphasis in original removed).

¶ 26 The facts before us are meaningfully different. The parties contested the question of an underlying occupational disease that led to Plaintiff's injury before the Commission and Plaintiff put forth expert medical evidence that her SLAP tear was the result of degenerative conditions brought on by her job. Specifically, Dr. Elder

testified: (1) the partial tearing or fraying of the labrum is a degenerative condition that more likely than not significantly contributed to Plaintiff's SLAP tear which necessitated surgery; and (2) Plaintiff's job duties placed her at a greater risk than the general population for this degenerative condition. The Commission then found facts to that effect. The *Valladares* opinion contained no similar expert testimony or findings by the Commission regarding an underlying degenerative condition. *Id.*

3. Dr. Elder's Testimony Is Competent to Show Occupational Disease

¶ 27 Defendants next argue that Dr. Elder's expert testimony in support of the *Rutledge* factors was so speculative as to not be competent evidence. We disagree.

¶ 28 In reviewing the Commission's determination on Dr. Elder's testimony for this case, "[c]ontradictions in the evidence go to its weight," *Harrell v. J.P. Stevens & Co., Inc.*, 45 N.C. App. 197, 206, 262 S.E.2d 830, 835 (1980), and "it is not within this Court's authority to reweigh the evidence and credibility of the witnesses," *Penegar v. United Parcel Serv.*, 259 N.C. App. 308, 318, 815 S.E.2d 391, 398 (2018). In other words, "[t]he decision concerning what weight to give expert evidence is a duty for the Commission and not this Court." *Adams v. Metals USA*, 168 N.C. App. 469, 483, 608 S.E.2d 357, 365-66 (2005) (citation omitted). Put simply, "[t]he findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence even though there is evidence to support contrary findings." *Gibbs*, 112 N.C. App. at 107, 434 S.E.2d at 656.

¶ 29 Dr. Elder affirmatively testified, among other things, that: (1) "more likely than not [Plaintiff's job] significantly contributed to [her] diagnoses," including the SLAP tear; (2) her job duties placed her at an increased risk of those conditions as compared to the general population; and (3) "[h]er occupational exposure to the job . . . significantly contributed to the need for surgery." He further testified that Plaintiff's repetitive on-the-job motions were the "straw that broke the camel's back," resulting in the SLAP tear. Such evidence closely mirrors evidence proffered in prior cases that supported findings of compensable occupational diseases. *See Flynn*, 171 N.C. App. at 357, 614 S.E.2d at 463 ("[Witness] testified that plaintiff's job, which involved significant overhead activity, predisposed plaintiff to, and placed him at a greater risk for, rotator cuff and shoulder problems, than the general public. . . . [Witness] further opined that because of the constant overhead activity, the incident . . . was 'the final straw that broke the camel's back.' "); *Gibbs*, 112 N.C. App. at 109, 434 S.E.2d at 657 ("[Witness] testified that plaintiff's injury was consistent with the type of work plaintiff performed and that plaintiff's work placed him at a higher risk than the general public for injuries to the shoulder or arms."); *Garren*, 131 N.C. App. at 97, 504 S.E.2d at 813 ("Both of plaintiff's medical experts testified in their depositions that the activities of plaintiff's job could have caused her occupational disease. . . . [Witness] stated that [the physical job activities described]

could 'certainly have been an aggravating activity' [and] this repetitive, excessive stress 'could actually be a causal factor.' ").

¶ 30 Dr. Elder's testimony thus supports the Industrial Commission's findings on the *Rutledge* factors, namely that her "employment . . . placed her at an increased risk of developing her right shoulder conditions as compared to members of the general public not so employed and was a significant contributing factor in the development of her right shoulder conditions."

¶ 31 Defendants correctly note that "when . . . expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Young,* 353 N.C. at 230, 538 S.E.2d at 915 (2000). To be sure, Dr. Elder did give some testimony that was qualified—he declined to state to what precise degree the job contributed to Plaintiff's conditions and declined to opine that Plaintiff would not have suffered her conditions absent her work duties. But this qualification does not mean that Dr. Elder's entire testimony "is based merely upon speculation and conjecture," *id.*, particularly when Dr. Elder explicitly refused to venture into speculation during his deposition.

¶ 32 It is not necessary for an expert to rule out all possible contributors to an injury or state definitively that the job caused the disease. *See, e.g., Adams*, 168 N.C. App. at 483, 608 S.E.2d at 365 ("The fact that the treating physician in this case could not state with reasonable medical certainty that plaintiff's accident caused his disability,

is not dispositive—the degree of the doctor's certainty goes to the weight of his testimony."). And while Dr. Elder also testified that he would expect to see the same degenerative conditions in anyone's 58-year-old shoulder regardless of occupation, this does not undercut his expert opinion, as "[a]ll ordinary diseases of life are not excluded from the statute's coverage. Only such ordinary diseases of life to which the general public *is exposed equally* with workers in the particular trade or occupation are excluded." *Rutledge*, 308 N.C. at 93, 301 S.E.2d at 365 (emphasis added). Indeed, Dr. Elder testified that while the degenerative condition of Plaintiff's shoulder was "not unusual," she was nonetheless "at a little bit greater risk because of her job."

¶ 33 Stated differently, that Dr. Elder anticipates seeing these degenerative conditions in 58-year-old shoulders independent of occupation does not mean that the general public is exposed to an equal risk of developing those conditions. As Dr. Elder elsewhere testified, anyone can develop a SLAP tear from any kind of motion, but the repetitive overhead motion of Plaintiff's right arm required by her job placed her at increased risk compared to the general population of developing degenerative conditions, the SLAP tear, and the need for surgery. While Dr. Elder did testify that it would be speculative to state to what precise degree the job contributed to Plaintiff's conditions, such precision is not required to meet the *Rutledge* elements. We therefore

hold that Dr. Elder's testimony was not so speculative as to be incompetent to show occupational disease.[2]

4. Plaintiff's Cross-Appeal is Untimely

¶ 34 Plaintiff contends that her time to file her cross-appeal was indefinitely tolled because she was never served with Defendants' notice of appeal. *See* N.C. R. App. P. 3(c) (2021) ("If timely notice of appeal is filed *and served* by a party, any other party may file and serve a notice of appeal *within ten days after the first notice of appeal was served* on such party." (emphasis added)). However, because precedent establishes that Rule 3(c) does not govern cross-appeals from the Industrial Commission, Plaintiff's argument fails.

¶ 35 Appeals from an award of the Industrial Commission are governed by N.C. Gen. Stat. § 97-86 (2021). Per its language, either party may appeal "within 30 days from the date of the award . . . under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions. The procedure for the appeal shall be as provided by the rules of appellate procedure." *Id.*

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[2] We note that the Commission expressly found Dr. Elder's testimony "credible" and "accord[ed] it great weight." To the extent there were conflicts in his testimony, "[c]ontradictions in the evidence go to its weight," *Harrell*, 45 N.C. App. at 205, 262 S.E.2d at 835, "[t]he decision concerning what weight to give expert evidence is a duty for the Commission and not this Court," *Adams*, 168 N.C. App. at 483, 608 S.E.2d at 365-66 (2005) (citation omitted), and "it is not within this Court's authority to reweigh the evidence and credibility of the witnesses," *Penegar*, 259 N.C. App. at 318, 815 S.E.2d at 398 (2018).

¶ 36 Rule 18, which governs appeals from administrative tribunals like the Industrial Commission, provides the procedure called for by Section 97-86. *Bradley v Cumberland Cty.*, 262 N.C. App. 376, 378-79, 822 S.E.2d 416, 418 (2018). Per its plain language, "[a]ny party to the proceeding may appeal from a final decision . . . by filing and serving a notice of appeal within thirty days after receipt of a copy of the final decision of the administrative tribunal." N.C. R. App. P. 18(b)(2) (2021). While Rule 18 generally mirrors Rule 3's language—which governs civil appeals from district and superior court—it deviates in one key respect: *it does not provide a separate timing provision for filing a cross-appeal*. *Compare* N.C. R. App. P. 3(c) ("If timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within ten days after the first notice of appeal was served on such party.") *with* N.C. R. App. P. 18 (lacking an analogous provision).

¶ 37 In *Strezinski v. City of Greensboro*, 187 N.C. App. 703, 654 S.E.2d 263 (2007), this Court directly addressed whether Section 97-86 and Rule 18, rather than Rule 3, control the timing of cross-appeals from the Industrial Commission. There, the Industrial Commission denied the plaintiff's claim for benefits and declined to award the defendant attorneys' fees. *Id.* at 705, 654 S.E.2d at 265. The plaintiff filed her notice of appeal within 30 days of the award as required by Rule 18; the defendant,

however, waited 35 days to file its cross-appeal challenging the award's denial of attorneys' fees.[3] *Id.*

¶ 38 In resolving the matter, we reviewed the plaintiff's appeal on the merits but dismissed the defendant's cross-appeal as untimely filed under Section 97-86 and Rule 18. Specifically, we held that Rule 3's timing provisions did not apply, as "[t]his is not a civil case; this is a direct appeal from an administrative agency. As such, it is governed by Rule 18." *Id.* at 710, 654 S.E.2d at 268. We further held that "the timeliness of defendant's appeal is governed by [S]ection 97-86, not Appellate Rule 3." *Id.* at 710, 654 S.E.2d at 268 (citation omitted). Thus, because both Section 97-86 and Rule 18 required any party appealing the award to file a notice of appeal within 30 days of the award's entry, the defendant's filing of a cross-appeal 35 days after the award (and on the last day allowable under Rule 3(c)'s cross-appeal timing provisions) was untimely and we were bound to dismiss it for want of jurisdiction. *Id.*

¶ *39* *Strezinski* is binding precedent. Because Plaintiff's cross-appeal was not filed within the 30 days specified in Rule 18, we lack jurisdiction to hear it.

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[3] The plaintiff in *Strezinski* filed her notice of appeal on 21 February 2007, making Saturday, 3 March 2007, the tenth day from filing; because filing periods that end on a non-business day do not terminate until the conclusion of the next regular business day, N.C. R. App. P. 27(a) (2021), the defendant filed its cross-appeal on Monday, 5 March 2007—the last day allowable under Rule 3's ten-day cross-appeal timing provision. *Id.*

¶ 40 Plaintiff nonetheless maintains that she may prosecute the arguments raised in her cross-appeal under Rule 10(c) of the Appellate Rules, which states:

> Without taking an appeal, an appellee may list proposed issues on appeal in the printed record based on any action or omission of the trial court that was properly preserved for appellate review and that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.

N.C. R. App. P. 10(c) (2021). But Rule 10(c), together with Rule 3(c), generally accords with analogous federal appellate law, under which:

> [a]n appellee who does not take a cross-appeal may urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court. *But an appellee who does not cross-appeal may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.*

Jennings v. Stephens, 574 U.S. 271, 276, 190 L. Ed. 2d 662, 668 (2015) (emphasis added) (quotation marks and citations omitted).

¶ 41 Plaintiff's cross-appeal seeks to expand her rights under the award, as it asks us to *reverse* the Industrial Commission's determination that she is not entitled to continuing disability benefits. Her argument does not, therefore, fall within the plain language of Rule 10(c), as it is not "based on any action or omission of the trial court . . . that deprived the appellee of an alternative basis of law for *supporting* the judgment." N.C. R. App. P. 10(c) (emphasis added). *Cf. Jennings*, 574 U.S. at 276, 190

L. Ed. 2d at 668. Because Plaintiff's arguments are not raised in support of award, but are instead posed to reverse and enlarge it, her reliance on Rule 10(c) is misplaced.

III. CONCLUSION

¶ 42 For the foregoing reasons, we affirm the Commission's opinion and award and allow Defendants' motion to dismiss Plaintiff's cross-appeal.

AFFIRMED; MOTION TO DISMISS CROSS-APPEAL ALLOWED.

Judges DIETZ and HAMPSON concur.

Report per Rule 30(e).